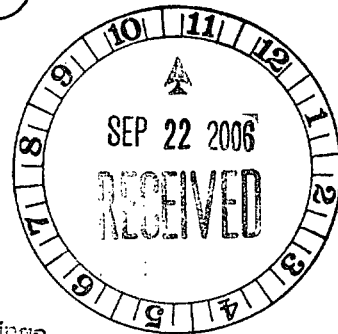


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21 September 2006
by express

ENTERED
Office of Proceedings

SEP 22 2006

Part of
Public Record

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: YILA -- Abandonment Exemption --
Yakima County, WA, AB 600 (Sub-no. 1X)

for filing: Opposition to De Facto
Petition to Reopen tendered by
Kershaw Sunnyside Ranches

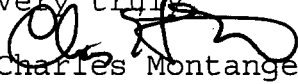
Dear Mr. Williams:

By letter dated 24 August, Yakima County and Yakima Interurban Lines Association (YILA) tendered a motion for extension of the applicable NITU negotiation period in this proceeding. On or about September 6, Kershaw Sunnyside Ranches filed an opposition to the extension request, but the opposition is tantamount to a petition to reopen the administratively final decisions in the underlying abandonment proceeding on the ground that the Board lacks any jurisdiction over the rail line in question. As a petition to reopen, the Kershaw petition should be denied for failure to show material error (let alone new evidence or changed circumstances), so that Kershaw cannot contrive to create some new 60-day appeal period to avoid the limitations on further judicial proceedings arising under ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987).

To this end, Yakima County and YILA enclose for filing the original and ten copies of a brief Opposition to Kershaw's pleading. The Yakima County/YILA Opposition tendered herewith is timely under 49 C.F.R. § 1104.15(a). To the extent otherwise, a motion for leave to file is embodied in the pleading.

Thank you for your assistance in this matter.

Very truly,


Charles Montange

for Yakima County and YILA

Encls.

cc. Counsel (per certificate of service) (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,)
-- Abandonment Exemption -- in) AB 600 (sub-no. 1X)
-- Yakima County, WA)

Opposition to Kershaw's Untimely De Facto
Motion to Reopen

Kershaw Sunnyside Ranches (Kershaw) has filed an "opposition" to the motion to extend the Notice of Interim Trail Use (NITU) negotiation period tendered by Yakima County and Yakima Interurban Lines Association (YILA) in this proceeding. The Kershaw "opposition," however, is in the nature of a de facto untimely motion/petition to reopen the entire abandonment proceeding on grounds of lack of Surface Transportation Board (STB) jurisdiction over the railroad line. Yakima County and YILA hereby jointly oppose Kershaw's untimely de facto motion/petition to reopen.¹

Kershaw's contentions concerning lack of jurisdiction could all have been raised when the Board issued its original notice of exemption. Under 49 U.S.C. § 1152.50(d)(3), timely petitions for reconsideration are due within 20 days of the Board's publication of a notice of exemption under section 1152.50.² This time lapsed months ago. A party such as Kershaw which belated attacks jurisdiction of the Board in effect is filing an

¹ STB regulations ordinarily provide 20 days for replies to petitions/motions (49 C.F.R. § 1104.15(a)), so this reply is timely.

² Similarly, any timely "appeal" is due within 20 days of the administratively final action. 49 C.F.R. § 1115.3(e). The time period may be extended for up to 20 more days. Id. However, this period has long since lapsed.

out-of-time motion for reconsideration. That amounts to a petition to reopen. Per this Board's rules, petitions to reopen must "state in detail" how the proceeding involves "material error" or present "new evidence" or "substantially changed circumstances." To reopen, STB must also make a determination of "material error," "new evidence," or "substantially changed circumstances." 49 C.F.R. § 1115.4.

Kershaw's sole contention is that the Board lacks jurisdiction over the rail line. Kershaw in effect contends that this Board committed "material error" in light of the alleged lack of jurisdiction. Kershaw states a number of arguments for this proposition, all of which are erroneous. Kershaw presents no "new evidence," for all the evidence and "facts" on which Kershaw relies are either patently false conjectures, or irrelevant points which could have been presented long ago in a timely petition for consideration or timely appeal. Similarly, Kershaw presents no "changed circumstances," let alone substantially changed circumstances.

Kershaw claims that YILA is an excursion rail operator and that the Board therefore lacks jurisdiction. YILA certainly has been an excursion operator, but over a different line. YILA operated excursion on a line from Yakima to Selah, but that is not the same line as the one (Fruitvale to Naches) in this proceeding. To the contrary, YILA obtained this line from BNSF under a notice of exemption for acquisition and operation of a line of freight railroad. See YILA -- Exemption -- BNSF, F.D.

33719, served March 4, 1999.³ BNSF never obtained abandonment authority for its STB-regulated common carrier freight operations on the line prior to transfer to YILA. Those obligations transferred to YILA as a matter of law. YILA undertook rehabilitation for freight rail service on the line but ran out of money. The fact that YILA ran out of money does not mean that common carrier obligations suddenly vanished such that the Surface Transportation Board was divested of jurisdiction. Pursuant to F.D. 33719, YILA became a freight rail provider as to this line, and this line remains under this Board's jurisdiction until the freight common carrier obligation is terminated and railbanking under 16 U.S.C. § 1247(d) is also terminated.

Kershaw relies on a statement by the Railroad Retirement Board (RRB) that YILA operates an "excursion railroad." As noted, YILA has operated an excursion railroad but not on the line in question in this proceeding. The RRB order to which Kershaw refers (attached as Exhibit 5 to Kershaw's Opposition) in fact refers on its face to YILA's operation from Yakima to Selah; it says nothing about YILA's activities on Yakima to Naches. Surely Kershaw knows the two are different. In any event, the RRB statement is thus irrelevant, and even if relevant the RRB statement would not be dispositive of STB jurisdiction.

³ Kershaw attaches a copy of this as part of Exhibit 6 to its filing.

Kershaw says there are no cars operating on the line at issue. That is certainly true; YILA ran out of money to complete rehabilitation. But neither is it "new evidence" or relevant in any sense helpful to Kershaw. Instead, it simply corroborates that YILA properly attested in its filings months ago that there were no traffic on the line for at least two years. No traffic for at least two years is a requirement for use of the 49 C.F.R. § 1152.50 notice of exemption procedures. In short, Kershaw's assertions are not new evidence, changed circumstances, or a showing of material error. Claims by Mr. Kershaw in his declaration about poor track conditions and so forth are of similar ilk. They are old hat, show no error, and corroborate the proper application of section 1152.50. What they most certainly do not do is show that the Board lacks jurisdiction. Kershaw's attorneys and Mr. Kershaw himself seem not to understand that this Board's jurisdiction preempts state common law until and unless the Board issues an effective abandonment authorization. See 49 U.S.C. §§ 10501(b) and 10901, et seq. Here, this Board has authorized railbanking in lieu of abandonment.

Kershaw claims the Board lacks jurisdiction because the line in question is severed from the interstate rail network. Kershaw provides no authority or evidence for this proposition, and it is patently untrue. The relevant connecting lead from YILA's line to the mainline (namely MP 0 to MP 2.97) has never been abandoned by BNSF. To the contrary, STB leased this

property to Central Washington Railroad in 2005. See Central Washington Railroad -- Lease and Operation Exemption -- BNSF, F.D. 34640, served Jan. 21, 2005. An easy review of the STB e-library demonstrates no abandonment by Central Washington. We attach an email explanation from BNSF confirming that there has been no severance.

As a result of the above, all the cases relied upon by Kershaw are irrelevant and require no discussion.

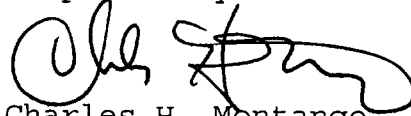
In short, all of the information now raised by Kershaw could have been supplied during the time provided under this Board's rules for a party to seek timely reconsideration of the Board's prior orders. Kershaw thus presents no new evidence, or changed circumstance. Kershaw's "evidence" in any event is misleading, irrelevant, or untrue conjecture. Kershaw has established no material error; to the contrary, its evidence insofar as reliable supports the Board's actions. Kershaw's pleading insofar as it is tantamount to a petition to reopen must be recognized as such and denied.

This Board's policy is to facilitate rail corridor preservation by granting extensions of railbanking negotiation periods upon reasonable request where the railroad as here consents. E.g., Union Pacific Railroad -- Abandonment Exemption -- in Kootenai County, ID, served Sept. 8, 2006, citing Rail Abandonments -- Supplemental Trails Act Procedures, 4 ICC2d 152, 157-58 (1987). This is the first request for an extension by Yakima County and YILA. We are unaware of any instance in which

an initial request for an extension has ever been denied in circumstances such as those presented here. The Yakima/YILA request is manifestly reasonable since the Board conditioned exercise of authority granted by its orders on compliance with section 106 of the National Historic Preservation Act, and we are in the process of completing compliance. The NITU negotiation period simply needs to be extended so we can do so ant then enter into a railbanking agreement. Kershaw does not appear to take umbrage with the reasonableness of an extension; Kershaw without any foundation simply asserts this Board never had any jurisdiction. In the end, Kershaw makes no legitimate argument for why ordinary Board policy should not be applied.

If Kershaw's paper is construed as merely a reply to the Yakima County motion for extension, then Yakima County and YILA seek leave to file this response in order to clarify the record and to underscore for the Board the misleading character of all of Kershaw's arguments. Kershaw is not prejudiced by this response. Moreover, this response could not have been tendered earlier for the undersigned counsel was out of the country.

Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936

Counsel for Yakima County and
Yakima Interurban Lines
Association

Certificate of Service

By my signature below, I certify service on September 21, 2006, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:

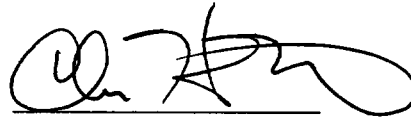
Paul Edmondson, Esq. (YILA)
313 North Third St.
Yakima, WA 98901

Raymond L. Paoletta
City Attorney
City of Yakima
200 South Third St.
Yakima, WA 98901-2830

Gregory S. Lighty, Esq.
Halverson & Applegate, P.S.
1433 Lakeside Court, Suite 100
Yakima, WA 98907-2715

Terry Austin, Esq.
Chief Civil Deputy Pros. Atty
Yakima County Courthouse
128 North 2d St., Room 211
Yakima, WA 98901

and by Federal Express on
Kevin T. Montoya,
Velkanje Moore & Shore,
405 East Lincoln Avenue,
Yakima, WA 98907

A handwritten signature in black ink, appearing to be "Kevin T. Montoya", written over a horizontal line.

c.montange

From: "Batie, Richard A" <Richard.Batie@bnsf.com>
To: "c.montange" <c.montange@verizon.net>
Cc: "Johnson, Jerome M" <Jerome.Johnson@bnsf.com>; "Randall, Chris M" <Christopher.Randall@BNSF.com>; "Aspebakken, John I" <John.Aspebakken@bnsf.com>; "Sims, John A" <John.Sims@bnsf.com>; "Bailiff, Sarah J" <Sarah.Bailiff@bnsf.com>; "DeBoever, Jake" <Jake.Deboever@BNSF.com>
Sent: Thursday, September 21, 2006 5:54 AM
Subject: RE: Yakima

C Montange,

This concerns the 2.97 mile Yakima - Fruitvale, WA line which abuts the 11.3 mile Fruitvale - Naches, WA line that was conveyed to Yakima Interurban Lines Association on February 25, 1999.

The 2.97 mile Yakima - Fruitvale, WA line was leased to the Central Washington Railway Company (CWA) on December 30, 2004.

BNSF continues to retain ownership of the Yakima - Fruitvale, WA line.

There has been no severance of the Fruitvale - Naches, WA line and the line continues to be connected to the National Rail System.

Rich Batie

c.montange

From: "Todd Leinbach" <tleinbach@cbrr.com>
To: "c.montange" <c.montange@verizon.net>
Sent: Thursday, September 21, 2006 1:00 PM
Subject: RE: Naches Branch

Central Washington Railroad currently serves Amerigas on the line connecting to the Naches Branch and we have not sought abandonment authorization for this connection.

Todd Leinbach

Central Washington Railroad
111 S. 33rd Street, Suite 200
Yakima, WA 98901
509-453-9166
509-453-9349 Fax

From: c.montange [mailto:c.montange@verizon.net]
Sent: Thursday, September 21, 2006 11:39 AM
To: tleinbach@cbrr.com
Subject: Naches Branch

Mr. Inbach, could you confirm to me by email reply that Columbia Basin Railroad actively serves a customer (Amerigas) at approximately MP 2.7 on the line connecting to the Naches Branch (MP 2.97 to end of line in Naches) currently owned by YILA?

Also, could you confirm that CBRR has not sought abandonment authorization for this connection?

I would appreciate a response by Noon if possible so I can make a filing at STB.

9/21/2006